

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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JAY STARKWEATHER,

Petitioner

v.

Case No. 07-C-513

JUDY SMITH,

Respondent.

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**ORDER GRANTING CERTIFICATE OF APPEALABILITY  
AND LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS**

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Petitioner Jay Starkweather filed a request for a Certificate of Appealability and also moves for leave to appeal *in forma pauperis* in the above matter. The court has previously denied Starkweather's petition for a writ of habeas corpus and a certificate of appealability is required in order for him to appeal his case. 28 U.S.C. § 2253(c)(2).

The certificate of appealability may issue only if the applicant makes a substantial showing of the denial of a constitutional right. The standard for making a "substantial showing" is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-484 (2000). If the court issues a certificate of appealability it must indicate on which specific issue or issues the petitioner has satisfied the "substantial showing" requirement. 28 U.S.C. § 2253(c)(3).

Starkweather seeks to proceed on appeal on the following issues:

1) Whether Starkweather was denied effective assistance of trial counsel on grounds that counsel failed to properly advise him regarding his right to testify on the issue of guilt or innocence.

2) Whether Starkweather was denied the effective assistance of trial counsel on the ground that counsel failed to use exculpatory evidence that Mr. Demery had been dead for some time before the police arrived.

3) Whether Starkweather was denied the effective assistance of appellate counsel on direct appeal on the ground that counsel failed to adequately challenge trial counsel's unreasonable advice regarding his right to testify.

4) Whether Starkweather was denied effective assistance of appellate counsel on direct appeal on the ground that counsel failed to challenge the trial court's failure to use exculpatory evidence.

5) Whether Starkweather was denied the effective assistance of appellate counsel on the ground that the issues that counsel failed to challenge the denial of a lesser included offense instruction on the homicide charge.

Although the court ruled against Starkweather on all of the above issues, the court recognizes that the issues presented are substantial and reasonable jurists can disagree. Accordingly, a certificate of appealability will be granted on each of the foregoing issues.

Starkweather also moves for leave to appeal *in forma pauperis*. I find that the appeal is sought in good faith and from my review of the trust statement from his accounts, it is clear Starkweather has insufficient funds, leaving aside his release account, to pay the full filing fee. Accordingly, leave to proceed *in forma pauperis* is also granted.

**THEREFORE, IT IS ORDERED** that the court grants a certificate of appealability on each of the issues set forth above and I further certify that the appeal is taken in good faith.

**IT IS FURTHER ORDERED** that leave to proceed *in forma pauperis* is also granted.

A copy of this order will be sent by my clerk to the Attorney General for the State of Wisconsin, c/o Gregory M. Weber, Assistant Attorney General, P.O. Box 7857, Madison, WI

53707; and to Gino J. Agnello, Circuit Clerk for the Seventh Circuit, United States Courthouse, 219 South Dearborn Street, Chicago, IL 60604.

**SO ORDERED** this 30th day of May, 2008.

s/ William C. Griesbach  
William C. Griesbach  
United States District Judge